APPELLANT PRO SE:

JAMES L. MAZZOCHI
Chicago, Illinois

IN THE
COURT OF APPEALS OF INDIANA

JAMES L. MAZZOCHI,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A05-0601-CV-24
	)	
JOHN R. CROMER,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0203-CC-497

September 21, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

John Cromer ("Cromer") filed a complaint against James Mazzochi ("Mazzochi") in Marion Superior Court asserting that Mazzochi was required to reimburse Cromer for paying the balance of a loan for which Cromer had executed an unlimited payment guaranty. A jury trial was held, and the jury issued a verdict in favor of Cromer awarding him damages in the amount of $9108.22. Mazzochi appeals and raises several issues, which we consolidate and restate as:

I. Whether the trial court had personal jurisdiction over Mazzochi;

II. Whether the trial court erred when it denied Mazzochi's motion to dismiss for failure to state a claim upon which relief can be granted;

III. Whether the jury's verdict in favor of Cromer is supported by sufficient evidence; and,

IV. Whether the evidence supports the $9108.22 damage award.

Concluding that Mazzochi has failed to establish any reversible error except as to the damage award, we affirm in part, reverse in part and remand for proceedings consistent with this opinion.

Facts and Procedural History

Mazzochi owns Chicago Plating, Incorporated, a small company that chrome plates automobile parts. In the early 1990s, Mazzochi invented a "closed loop" electroplating process whereby Mazzochi controlled the rinse water in the plating processes and recirculated the rinse water back into the plating system. Thus, no heavy metal wastewater was released into the sewer system, but was reused and recycled within the electroplating process. Mazzochi filed for a United States patent for this process in 1993.

Mazzochi also formed a corporation known as Water Resource Management ("WRM") with Lawrence Driscoll ("Driscoll") and Robert Signom ("Signom"). WRM is an Ohio corporation and its purpose was to market and license Mazzochi's "closed loop" electroplating process. Signom eventually recommended making Cromer, an environmental lawyer, a shareholder of the corporation due to his industry contacts. After WRM was established, Mazzochi was named president of the corporation and held a large majority of the shares in WRM. The remaining shareholders each had ten shares.

Before Cromer became a shareholder in WRM, the corporation obtained a $25,000 loan from PNC Bank in Ohio. Mazzochi, Driscoll, and Signom each personally guaranteed the note to PNC Bank. In 1996, WRM entered into a signed loan agreement with Fifth Third Bank for a loan totaling $25,000. The Fifth Third Bank loan was used to repay the PNC Bank loan. Once again, all of the shareholders, including Cromer, personally guaranteed the note to Fifth Third Bank.

WRM eventually failed and did not produce any income. Mazzochi personally made payments on the Fifth Third Bank loan. However, he ceased making payments at some time prior to July 30, 2001. On that date, Cromer paid the remaining balance of $4144.29, after Mazzochi refused to make any further payment on the loan.

On March 21, 2002, Cromer filed a complaint against Mazzochi in Marion Superior Court. In the complaint, Cromer alleged that the Fifth Third Bank loan was used by Mazzochi to fund his daughter's law school tuition. Cromer requested damages in the amount of $4144.29 plus costs and all other just and proper relief. In response, Mazzochi moved to dismiss the complaint for lack of personal jurisdiction. His motion

was denied on February 25, 2003. Mazzochi also filed a Trial Rule 12(B)(6) motion to dismiss the complaint. That motion was also denied.

On April 16, 2003, Mazzochi filed a counterclaim against Cromer and a third-party complaint against Signom. A jury trial commenced on June 21, 2005.[1] The jury returned a verdict of $9108.22 in favor of Cromer and a verdict of $15,108.22 in favor of Mazzochi on his third-party complaint against Signom. On December 20, 2005, the trial court issued a judgment awarding damages to Cromer in the amount of $9108.22 against WRM and Mazzochi, jointly and severally.[2] Mazzochi now appeals. Additional facts will be provided as necessary.

Standard of Review

Initially, we note that Cromer has failed to file an appellee's brief. In such a case, we need not undertake the burden of developing arguments for Cromer. Butrum v. Roman, 803 N.E.2d 1139, 1142 (Ind. Ct. App. 2004), trans. denied. Applying a less stringent standard of review, we may reverse the trial court if the appellant establishes prima facie error. Id. "Prima facie" is defined as "at first sight," "on first appearance," or "on the face of it." Id.

I. Personal Jurisdiction

Personal jurisdiction is a court's power to bring a person into its adjudicative process and render a valid judgment over that person. Saler v. Irick, 800 N.E.2d 960, 965

[1] At the close of evidence of Cromer's case-in-chief, the trial court granted Mazzochi's motion for judgment on the evidence on Cromer's claim of common law contribution.

[2] The court also entered judgment against Signom and in favor of Mazzochi on his third-party complaint in the amount of $15,108.22.

(Ind. Ct. App. 2003) (citing Black's Law Dictionary 857 (7th ed. 1999)). "The existence of personal jurisdiction over a defendant is a constitutional requirement in rendering a valid judgment, mandated by the Due Process Clause of the Fourteenth Amendment." Id. Our court employs a de novo standard of review "when reviewing questions of whether personal jurisdiction exists." Id.

To determine whether an Indiana court has personal jurisdiction, the court must proceed with a two-step analysis. In re Estate of Baker, 837 N.E.2d 603, 609 (Ind. Ct. App. 2005). Initially, the court must consider if the defendant's contacts with Indiana fall under Trial Rule 4.4, our equivalent of a "long arm statute." Id. If the defendant's contacts fall under Trial Rule 4.4, the court must then determine whether his contacts satisfy federal due process analysis. Id.

Trial Rule 4.4 provides in pertinent part: "Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or her or his or her agent: (1) doing any business in this state[.]" Ind. Trial Rule 4.4 (2006). Moreover, the rule provides that "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States." Id.

An expansive definition of the term "business" is required when interpreting Rule 4.4. See Saler, 800 N.E.2d at 965. Our court has defined "business" to mean an affair or matter or "a special task, duty, or function." Id. at 966 (citations omitted).

In this case, WRM obtained a $25,000 loan from Fifth Third Bank in Indianapolis. Mazzochi signed the loan agreement as president of WRM. Mazzochi also signed an unlimited payment guaranty. We conclude that Mazzochi's actions with regard to this loan transaction constitute doing business in Indiana, as that term is interpreted under Rule 4.4. See Estate of Baker, 837 N.E.2d at 610-11 (The defendant's multiple transactions with the decedent's Indiana bank accounts were sufficient to establish that the defendant was doing business in Indiana under Trial Rule 4.4.); Saler, 800 N.E.2d at 965-66 (The defendants' collection of the decedent's Indiana payable-on-death accounts established that the defendants "have maintained contacts such that they fall within the long-arm jurisdiction of Indiana.").

Next, we must examine whether asserting jurisdiction violates the Due Process Clause of the Fourteenth Amendment. Estate of Baker, 837 N.E.2d at 611.

> The United States Supreme Court has explained this to mean that a person must have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The existence of personal jurisdiction depends on the nature and quality of the contacts with the forum, not a mechanical test. Furthermore, contacts are sufficient to establish personal jurisdiction only if there is some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Only the acts of the defendant, and not the acts of a third party or plaintiff, satisfy this requirement.

Id. at 611 (internal citations omitted).

In determining whether personal jurisdiction exists consistent with the Due Process Clause, we must first consider whether the contacts between the defendant and the forum state are sufficient to establish that the defendant could "reasonably anticipate

being haled into court there." Id. "Contacts are any acts physically performed in the forum state or acts performed outside the forum state which have an effect within the forum state." Saler, 800 N.E.2d at 966.

"A single contact with a forum state may be enough to establish specific personal jurisdiction if it creates a substantial connection with the forum state and the suit is based upon that connection."[3] Id. at 967.

> However, the act must be purposeful, not random, fortuitous, or attenuated, nor may it be the unilateral activity of another party or a third person. The analysis of contacts for specific personal jurisdiction is fact-specific and determined on a case-by-case basis. Factors to consider when evaluating the defendant's contacts with the forum state are: (1) whether the claim arises from the defendant's forum contacts, (2) the overall contacts of the defendant or its agent with the forum state, (3) the foreseeability of being haled into court in that state, (4) who initiated the contacts, and (5) whether the defendant expected or encouraged contacts with the state.

Id. (internal citation omitted).

WRM entered into the loan agreement with Fifth Third Bank in Indianapolis. Mazzochi signed the loan agreement in his capacity as president of WRM. Importantly, Mazzochi also executed an unlimited payment guaranty and exerted control over the loan funds. Therefore, in obtaining a loan with Fifth Third Bank, Mazzochi initiated and encouraged contacts with the state of Indiana. Furthermore, Cromer's claim against Mazzochi arises from Mazzochi's contacts with Indiana as Cromer claims that Mazzochi misused the loan provided by an Indiana bank. Finally, it is not unforeseeable that Mazzochi could be haled into an Indiana court if a claim or dispute arose concerning the

[3] It appears from the record that Indiana courts do not have general personal jurisdiction over Mazzochi. Accordingly, we address only whether Indiana courts have specific personal jurisdiction over Mazzochi with regard to the Fifth Third Bank loan transaction.

Indiana loan transaction. Accordingly, we conclude that Mazzochi's contacts with Indiana were purposeful and sufficient to establish specific personal jurisdiction.

Because we have determined that Mazzochi's contacts with Indiana are sufficient, we must now consider "whether the exercise of personal jurisdiction offends 'traditional notions of fair play and substantial justice' by weighing a variety of interests." Estate of Baker, 837 N.E.2d at 611 (citation omitted).

> In doing so, we must balance the following factors to determine whether the assertion of jurisdiction is reasonable and fair: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. The defendant carries the burden of establishing that asserting jurisdiction is unfair and unreasonable. To determine if the exercise of personal jurisdiction is reasonable in a particular case, we may examine the relationship among the defendant, the forum, and the litigation, the principles of interstate federalism, and the existence of an alternative forum to hear the dispute.

Id. at 613.

First, we observe that as a resident of Chicago, a slight burden is placed on Mazzochi for having to defend against this action in Indiana. However, "with the advancements in travel and communication technology, defending oneself in another state than where one resides is not as severe a burden as it once was." Id. (citing Saler, 800 N.E.2d at 970). Moreover, Indiana has an interest in adjudicating this dispute. Cromer, the plaintiff, resides in Indiana, the loan agreement was executed in Indiana, and the loan proceeds were provided by an Indiana bank. Cromer's interest in obtaining effective and convenient relief is compelling because Cromer, an Indiana resident,

executed his personal guaranty in Indiana with an Indiana bank. For these same reasons, we conclude that adjudicating this dispute in Indiana provides an efficient resolution of the controversy.

Under these facts and circumstances, we cannot conclude that it is unfair or unreasonable for an Indiana court to exercise personal jurisdiction over Mazzochi and the exercise of such jurisdiction does not offend the traditional notions of fair play and substantial justice. Accordingly, the trial court properly denied Mazzochi's motion to dismiss for lack of personal jurisdiction.

II. Trial Rule 12(B)(6) Motion to Dismiss

Mazzochi also contends that the trial court erred when it denied his Trial Rule 12(B)(6) motion to dismiss Counts I and III of Cromer's complaint for failure to state a claim upon which relief can be granted. Our standard of review of a trial court's denial of a motion to dismiss for failure to state a claim is de novo. Sims v. Beamer, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001).

A Trial Rule 12(B)(6) motion to dismiss tests the legal sufficiency of a claim, not the facts supporting it. Town of Plainfield v. Town of Avon, 757 N.E.2d 705, 710 (Ind. Ct. App. 2001), trans. denied. A complaint may not be dismissed under Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief. McQueen v. Fayette County Sch. Corp., 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), trans. denied (A plaintiff need only plead the operative facts involved in the litigation;

therefore, a complaint is sufficient if it states any set of allegations, no matter how unartfully pleaded, upon which the trial court could have granted relief.).

In ruling on a motion to dismiss for failure to state a claim, the trial court is required to view the complaint in a light most favorable to the nonmoving party and with every reasonable inference in his favor. Id. The trial court may only look to the complaint, and well-pleaded material must be taken as admitted. Id. Dismissals under Trial Rule 12(B)(6) are "rarely appropriate." State Civil Rights Comm'n v. County Line Park, Inc., 738 N.E.2d 1044, 1049 (Ind. 2000).

In his complaint, Cromer alleged that Mazzochi, as president of WRM, entered into the loan agreement with Fifth Third Bank for the purpose of funding his daughter's law school tuition. Cromer stated that he, Mazzochi, Signom, and Driscoll, each executed unlimited payment guarantees. Moreover, Cromer alleged that Mazzochi purposefully defaulted on the Fifth Third loan "with the intent that the balance be paid by one of the parties who guaranteed the note on his behalf." Appellant's App. p. 292. After Mazzochi refused to pay the balance of the loan, Cromer paid the remaining balance of $4144.29.

In Count I of his complaint, Cromer alleged that WRM and Mazzochi, the principal debtors, "have a duty to reimburse [Cromer] as he fulfilled their obligation under the note with Fifth Third Bancorp." Id. at 293. In Count III of the complaint, entitled "action for debt," Cromer simply alleged that he paid a debt owed by WRM and Mazzochi, and therefore, he is entitled to recover $4144.29 from the debtors. Id. at 294.

"A guaranty is defined as 'a promise to answer for the debt, default, or miscarriage of another person.'" S-Mart Inc. v. Sweetwater Coffee Co, Ltd., 744 N.E.2d 580, 585 (Ind. Ct. App. 2001), trans. denied (quoting 38 Am. Jur. 2d Guaranty § 1 (1999)). "It is an agreement collateral to the debt itself and represents a conditional promise whereby the guarantor promises to pay only if the principal debtor fails to pay." Id. It is well settled that "a guarantor who satisfies the principal debtor's obligation to the creditor generally steps into the shoes of the creditor, becoming subrogated to the creditor's claim and assuming both the creditor's rights and duties." Farmers Loan & Trust Co. v. Letsinger, 652 N.E.2d 63, 67 (Ind. 1995) (citing Ertel v. Radio Corp. of Am., 261 Ind. 573, 577, 307 N.E.2d 471, 474 (1974)); see also Pearlman v. Reliance Ins. Co., 371 U.S. 132, 136-37 (1962) ("[P]robably there are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.").

Cromer alleged that Mazzochi is personally liable for the Fifth Third loan because Mazzochi used the loan to pay a personal obligation, i.e. his daughter's law school tuition.[4] Therefore, Cromer, a guarantor of the loan, contended that Mazzochi must

[4] Mazzochi contends that his alleged oral promise to pay the Fifth Third loan is unenforceable because such contracts must be in writing pursuant to Indiana Code section 32-21-1-1, Indiana's statute of frauds. That statute provides in relevant part, "A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent: . . . (2) An action charging any person, upon any special promise, to answer for the debt, default, or miscarriage of another." As alleged in Cromer's complaint, Mazzochi promised to pay the loan because the loan was used to pay his own personal obligation. Accordingly, his promise does not fall within the statute of frauds. See also Walker v. Elkin, 758 N.E.2d 972, 975 (Ind. Ct. App. 2001) (citing New Amsterdam Casualty Co. v. Madison

reimburse him for paying the remaining balance of the loan. Accordingly, we conclude that Cromer sufficiently pled allegations stating a claim upon which relief can be granted, and the trial court properly denied Mazzochi's Trial Rule 12(B)(6) motion to dismiss.

III. The Jury's Verdict

Third, Mazzochi contends that the jury's verdict is not supported by the evidence and is contrary to law.[5] Specifically, Mazzochi contends that he cannot be held personally liable for the Fifth Third loan. We will not disturb the jury's verdict absent a showing by Mazzochi that the verdict and judgment are contrary to law. Bd. of Trustees of Ball State Univ. v. Strain, 771 N.E.2d 78, 84 (Ind. Ct. App. 2002). "A verdict is contrary to law when the evidence is without conflict and leads to a conclusion opposite of that reached by the jury." Id.

Initially, we observe that Mazzochi repeatedly asserts that the Fifth Third loan proceeds were not used to pay a personal obligation. At trial, Cromer and Signom testified that Mazzochi stated that he used the initial PNC Bank loan to pay his daughter's law school tuition and the Fifth Third Bank loan was used to pay off the PNC Bank loan. Tr. pp. 78, 86, 111. Given the jury's verdict in favor of Cromer, we must necessarily conclude that the jury found this testimony to be credible. Our court has repeatedly stated that it is within the province of the jury to judge the credibility of witnesses and to

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County Trust Co., 81 Ind. App. 157, 142 N.E. 727, 729 (1924)) ("Moreover, the statute does not apply to promises in respect to debts created at the instance and for the benefit of the promisor.")

[5] In his statement of the issues, Mazzochi asserts that he "should have been permitted to rely on the Driscoll Affidavit, and was prejudiced by its exclusion as a result of the lack of a pretrial conference to enable Mazzochi to resolve Cromer objections in advance of trial." Br. of Appellant at 1. However, Mazzochi failed to support this argument with cogent reasoning and citation to relevant authority. Therefore, the issue is waived. See Ind. Appellate Rule 46(A)(8)(a) (2006).

weigh the evidence. City of Carmel v. Leeper Elec. Servs., Inc., 805 N.E.2d 389, 392 (Ind. Ct. App. 2004), trans. denied.

As we stated above, "a guarantor who satisfies the principal debtor's obligation to the creditor generally steps into the shoes of the creditor, becoming subrogated to the creditor's claim and assuming both the creditor's rights and duties." Farmers Loan & Trust Co., 652 N.E.2d at 67. The evidence presented at trial established that Cromer, as a guarantor, paid the balance of the Fifth Third loan after Mazzochi ceased making payments. Although Mazzochi continually asserts that WRM was the principal debtor of the Fifth Third loan, given Mazzochi's own statements that he used the Fifth Third loan to pay a personal obligation and that he would personally make all payments on the loan, we conclude that the jury's finding that Mazzochi was personally liable for the Fifth Third loan is supported by sufficient evidence. Moreover, Cromer did not receive any benefit from the Fifth Third loan proceeds, and therefore, equity demands that he be reimbursed for paying the balance of the loan.

IV. Damage Award

Finally, Mazzochi contends that the jury's damage award of $9108.22 is excessive and not supported by the evidence. A jury determination of damages is entitled to great deference when challenged on appeal. Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 462 (Ind. 2001). We will look only to the evidence and inferences therefrom which support the jury's verdict. Id. We will not deem a verdict to be the result of improper considerations unless it cannot be explained on any other reasonable ground. Id. Thus, if

there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed. Id.

In his complaint, Cromer requested compensatory damages in the amount of $4144.29 plus interest. At trial, Cromer testified that he paid the remaining balance of the Fifth Third loan in the amount of $4144.29 after Mazzochi defaulted on the loan. Tr. p. 113. During closing arguments, Cromer argued that the jury should find "Mazzochi [] personally liable for the note and award Mr. Cromer the $4144.29 that he paid to fund [Mazzochi's] personal business." Tr. p. 240.

From the record before us, there is no evidence supporting the jury's damage award of $9108.22. Accordingly, we conclude that Mazzochi has established prima facie error. Therefore, we reverse and remand this case to the trial court with instructions to reduce the damage award to $4144.29.

Conclusion

The trial court had personal jurisdiction over Mazzochi. Moreover, the trial court properly denied Mazzochi's motion to dismiss Cromer's complaint for failure to state a claim. In addition, the evidence was sufficient to establish that Mazzochi was personally liable for the remaining balance of the Fifth Third loan. However, the record before us does not support the $9108.22 damage award. Therefore, we remand this case to the trial court with instructions to reduce the damage award to $4144.29.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

FRIEDLANDER, J., and BARNES, J., concur.